RHB Capital Bhd v Carta Bintang

HIGH COURT (KUALA LUMPUR) — SUIT NO D3–22–1822 OF 2001
HAMID SULTAN J
6 JULY 2012

Companies and Corporations — Memorandum of association — Sales of shares agreement — Variation and modification through supplemental agreement — Cut-off date — Extension of three months — Status of shares agreement — Whether plaintiff entitled to return of deposit — Whether plaintiff's obligated to return shares and transfer documents — Whether dependent on return of deposit by defendant — Whether entitled to forfeit deposit — Damages

The defendant was the sole shareholder of SJ Securities Sdn Bhd ('SJ Securities') and holder of all the issued and paid-up share capital of SJ Securities comprising 60,000,000 ordinary shares of RM1 each ('the shares'). The defendant and Rashid Hussain Securities Sdn Bhd, a wholly-owned subsidiary of the plaintiff, entered into a memorandum of agreement ('MOA'). The plaintiff and the defendant then entered into a sale of shares agreement ('SSA') which was subsequently varied and modified by a supplemental sale of share agreement ('supplement SSA'). On 15 September 2000, the plaintiff, paid an initial deposit of RM6,560,000. On 7 November 2000, the plaintiff paid the balance of the deposit in the sum of RM26,240,000 and the deposit was held by stakeholders ('stakeholders'). While still holding the balance of RM6,688,153.42, the stakeholders released RM19,551,846.58 to the chargee bank as the redemption sum for the shares were charged by the defendant to the chargee bank. The plaintiff made the relevant applications to the Foreign Investment Committee to the Kuala Lumpur Stock Exchange and the Securities Commission. The plaintiff then requested the defendant for an extension of three months of the cut-off date since the relevant approvals and consents were not obtained by either party. Before the court, the arising issues were relating to the agreement between the parties as to the cut off date; the status of the SSA; whether the plaintiff was entitled to the return of the deposit of RM32,800,000 ('the deposit'); whether any obligation on the part of the plaintiff to return the shares and transfer documents was dependent on the return by the defendant to the plaintiff of the deposit; whether the defendant was entitled to forfeit the deposit and whether the defendant was entitled any form of damages; and the proper measure of damages?

Held, allowing the plaintiff's claim and dismissing the defendant's counterclaim:

(1) The plaintiff's evidence was consistent with the relevant documents but

the same cannot be said for the defendant. In the instant case, despite severe cross examination of the plaintiff's witness, the defendant was not able to establish their version of the case more importantly, the concern and complaint in their letter dated 15 June 2001. The cut off date as 7 February 2001 was clearly stated, and in consequence any confusion relating to this issue in subsequent correspondence without any contemporaneous objection by the defendant would lack probative force (see para 13).

(2) Clause 4.05 was not a *force majeure* clause. *Force majeure* clauses were clauses generally intended to include risks beyond the reasonable contract of a party. In essence, it freed both parties from liability or obligation when an event such as war, riot or act of God such as earthquake takes place. By no stretch of imagination can cl 4.5 be stated as *force majeure* clause as asserted by the defendant (see para 15(d)).

(3) The plaintiff's prayers (a), (b) and (c) with interest of 4%pa were allowed with costs. The defendant's counterclaim was dismissed with costs of RM100,000. The plaintiff was to pay allocatur fees before the extraction of order for costs, and the deputy registrar to issue certificate for the allocatur (see para 16).

[Bahasa Malaysia summary

Defendan adalah pemegang saham tunggal SJ Securities Sdn Bhd ('SJ Securities') dan pemegang kesemua saham terbitan dan modal terbayar SJ Securities terdiri daripada 60,000,000 saham biasa RM1 setiap satu ('saham'). Defendan dan Rashid Hussain Securities Sdn Bhd, subsidiary milik penuh oleh plaintif, memasuki memorandum perjanjian ('MOA'). Plaintif dan defendan kemudiannya memasuki perjanjian jualan saham ('SSA') yang kemudiannya dipelbagaikan dan diubah mengikut perjanjian tambahan jualan saham ('SSA tambahan'). Pada 15 September 2000, plaintif, membayar deposit permulaan sejumlah RM6,560,000. Pada 7 November 2000, plaintif membayar baki deposit tersebut sejumlah RM26,240,000 dan deposit dipegang oleh pemegang amanah ('pemegang amanah'). Sementara masih memegang baki sejumlah RM6,688,153.42, pemegang amanah membayar sejumlah RM19,551,846.58 kepada bank pemegang gadaian sebagai jumlah penebusan untuk saham-saham yang dicaj oleh defendan kepada bank pemegang gadaian. Plaintif membuat permohonan relevan kepada Jawatankuasa Pelaburan Asing kepada Bursa Saham Kuala Lumpur dan Suruhanjaya Sekuriti. Plaintif kemudiannya memohon kepada defendan untuk pelanjutan masa tiga bulan daripada tarikh akhir memandangkan kelulusan dan keizinan tidak diperolehi oleh kedua-dua pihak. Di hadapan mahkamah, isu-isu berbangkit adalah berkaitan perjanjian di antara pihak-pihak terhadap tarikh akhir; status SSA; sama ada plaintif berhak kepada pemulangan deposit sejumlah RM32,800,000 ('deposit'); sama ada apa-apa tanggungjawab bagi pihak plaintif untuk memulangkan saham dan dokumen

pindahan adalah bergantung atas pemulangan deposit oleh defendan kepada plaintif; sama ada defendan berhak untuk melucut hak deposit dan sama ada defendan berhak kepada apa-apa bentuk ganti rugi; dan langkah betul ganti rugi?

Diputuskan, membenarkan tuntutan plaintif dan menolak tuntutan balas defendan:

(1) Keterangan plaintif adalah konsisten dengan dokumen relevan tetapi ianya tidak boleh dikatakan terhadap defendan. Dalam kes ini, walaupun pemeriksaan balas rapi terhadap saksi plaintif, defendan tidak dapat membuktikan versi kes mereka dengan lebih penting ke atas kebimbangan dan aduan di dalam surat mereka bertarikh 15 Jun 2001. Tarikh akhir sebagai 7 Februari 2001 jelas dinyatakan, dan akibanynya apa-apa kekeliruan berkaitan isu ini dalam surat berikutnya tanpa apa-apa bantahan semasa oleh defendan akan kekurangan kuasa probatif (lihat perenggan 13).

(2) Klausa 4.05 bukan klausa *force majeure*. Klausa *force majeure* adalah klausa yang biasanya bertujuan untuk memasukkan risiko melampaui kontrak munasabah pihak. Pada asasnya, ia membebaskan kedua-dua pihak daripada liabiliti atau tanggungjawab apabila kejadian seperti perang, rusuhan atau tindakan Tuhan seperti terjadinya gempa bumi. Adalah tindak mungkin klausa 4.5 boleh dinyatakan sebagai klausa *force majeure* seperti yang dihujahkan oleh defendan (lihat perenggan 15(d)).

(3) Permohonan-permohonan plaintif (a), (b) dan (c) dengan faedah sebanyaj 4% setahun dibenarkan dengan kos. Tuntutan balas defendan ditolak dengan kos sebanyak RM100,000. Plaintif dikehendakki untuk membayar fi alokatur sebelum pengekstrakan perintah untuk kos, dan timbalan pendaftar untuk mengeluarkan sijil untuk alokatur (see para 16).]

Cases referred to

Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd, The Good Luck [1992] 1 AC 233, HL (refd)

Hotel Anika Sdn Bhd v Majlis Daerah Kluang Utara [2007] 1 MLJ 248; [2006] 4 CLJ 981, HC (refd)

Persimmon, Homes (South Coast) Ltd v Hall Aggregates (South Coast) Ltd [2008] EWHC 2379, QBD (refd)

Legislation referred to

Contracts Act 1950 ss 33, 36

Robert Lazar (Nad Segaram and Soo Siew Mei with him) (Shearn Delamore & Co) for the plaintiff.

Chevalier Ambiga (Michael Chow, Mohd Rizal and HJ Kong with her) (Bahari & Bahari) for the defendant.

Hamid Sultan J:

[1] This is my judgment in respect of the plaintiff's claim for refund of deposit paid in respect of sale of shares agreement relating to a stock broking house by the name of SJ Securities Sdn Bhd. The prayers in the statement of claim read as follows:

Wherefore the Plaintiff claims against the Defendant as follows:

(i) the sum of RM32,800,000 due and outstanding as at the 17th of April 2001;

(ii) interest at the rate of 8% per annum from the 18th of April 2001 to the date of judgment;

(iii) interest at the rate of 8% per annum from the date of judgment to the date of full realization;

(iv) costs of this action; and

(v) such further and/or other relief as this Honourable Court shall deem fit and proper to grant.

[2] The defendant has also raised a counterclaim and the prayers read as follows:

WHEREFORE the Defendant claims against the Plaintiff:

(i) the sum of RM6,688,153.42, being the balance of the deposit owing by the Plaintiff to the Defendant and held by the Stakeholder solicitors together with all interest accrued thereon;

(ii) the amount of RM 2 million from the Plaintiff in respect of reliance loss occasioned by the expenses incurred by the Defendant in reliance of the express/implied terms of the said agreements, the Plaintiffs representations and/or undertakings and/or the collateral agreement;

(iii) the amount of RM 250 million from the Plaintiff for opportunistic losses suffered as a result of the Plaintiffs said repudiatory breach of contract;

(iv) general damages, aggravated and/or exemplary damages;

(v) the immediate release and return of all share certificates of SJ Securities Sdn. Bhd. And share transfer forms in respect thereof currently held by the Stakeholders solicitors;

(vi) interest on all the above sums at the rate of 8% per annum from the date of filing of this Counterclaim until full settlement;

(vii) costs; and

A (viii) further or other reliefs deemed fit and proper by this Honourable Court.

[3] It must be noted that in the instant case the transaction would have proceeded smoothly if the defendant had given a three month extension as requested by the plaintiff. The defendant was only prepared to give a month's extension with interest of 10%pa which triggered the plaintiff to terminate the agreement. Learned counsel for the plaintiff articulates this issue in the submission as follows:

C The Plaintiff's case is straightforward. The Plaintiff requested for a 3 month extension. The Defendant responded to say that it was only prepared to grant a 1 month extension complied with the payment of interest. That was a counter offer which effectively killed off the offer. Since the Plaintiff never accepted the Defendant's counter offer, there was no mutual agreement to extend.

D

[4] It must also be noted that the allegation of collateral contract in the defence and counterclaim was not pursued in the right perspective and lacks jurisprudential basis. Learned counsel for the plaintiff has articulated this issue in the submission as follows:

E The 'Collateral Contract' is further pleaded at paragraphs 5.2, 5.3, 5.6 and the entire paragraph 6 of the Defence. In any event, the allegation of 'collateral contract' is wholly untenable. In this regard we refer to Your Lordship's recent decision in Alliance Bank Malaysia Berhad v W. Shalihudin bin W. Ibrahim [unreported case]

F However at trial, the Defendant never pursued this line of defence. It was never suggested to any of the Plaintiff's witnesses that there ever was such a collateral contract as pleaded. Neither did the witnesses called by the Defendant ever testify that there was such a collateral contract. It must now be the case that the Defendant has abandoned the main plank of their Defence, as a perusal of the Defence will show that the allegation of a collateral contract formed the sheet anchor of their G Defence and indeed even their Counterclaim.

[5] In addition, the issue of delay in the application of approvals which the defendant attempts to canvass was not raised by the parties at the material time H and in fact, it was a non-issue.

[6] Learned counsel for the plaintiff takes strong objection to the delay issue and says:

I This has never been the Defendant's pleaded case. It is not the Defendant's case that the delay in submitting the applications amounts to a breach of contract on the part of the Plaintiff. It is a cardinal rule in civil litigation that parties are bound by their pleadings. See *RHB Bank Bhd v Kwan Chew Holdings Sdn Bhd* [2010] 1 CLJ 665 [PBA Jilid II Tab 15]. Hence the issue raised by the Defendant now is irrelevant.

[7] The cases parties have relied on are set out in the annexure to the judgment.

THE BRIEF FACTS

[8] The learned counsels for the plaintiff and the defendant have summarised their case in encls 111 and 110 respectively. Much judicial time will be saved if these enclosures are repeated.

[9] The plaintiff's summary of case in encl 111 reads as follows:

THE PLAINTIFF'S SUMMARY OF CASE

(1) The Plaintiff's claim is for the return of a sum of money amounting to RM32,800,000.00 paid as deposit together with interest pursuant to the Memorandum of Agreement dated 15.9.2000 ('MOA'), the Sale of Shares Agreement dated 7.11.2000 ('SSA') and Supplemental Sale of Shares Agreement ('Supplemental SSA').

(2) Pursuant to the MOA between the Defendant and Rashid Hussain Securities Sdn Bhd as it was then known ('RHS') it was agreed that RHS would purchase 60,000,000 ordinary share of RM1.00 each in SJ Securities Sdn Bhd ('the Shares') which was held by the Defendant. Pursuant to Clause 12 of the MOA, RHS nominated the Plaintiff as the signatory to a share sale agreement relating to the Shares.

(3) Pursuant to the SSA, the Defendant agreed to sell and the Plaintiff agreed to buy the Shares upon the terms and conditions set out therein for a purchase consideration of RM328,000,000.00 ('the Purchase Consideration').

(4) Pursuant to the MOA, the sum of RM6,560,000.00 representing 2% of the purchase price was paid to the Defendant as earnest monies and as part payment towards the purchase price.

(5) The Plaintiff then paid a further sum of RM26,240,000.00 to the Defendant's then solicitors, Messrs Kadir Tan & Ramli, acting as stakeholders representing 8% of the purchase price and the balance of the deposit payable under the SSA.

(6) The sum paid by the Plaintiff as deposit under the SSA amounting 10% of the purchase price which was RM32,800,000.00 ('the Deposit').

(7) The SSA was then varied and modified by a Supplemental Sale of Shares Agreement ('Supplemental SSA') dated 30.11.2000. The Supplemental SSA appointed Messrs Kadir Andri Aidham & Partners ('the Stakeholders') as stakeholders in place of Messrs Kadir Tan & Ramli. Pursuant to the Supplemental SSA, the Stakeholders paid a sum of RM19,551,846.58 to Amanah Merchant Bank Berhad ('Chargee Bank') as redemption sum for that part of the Shares charged by the Defendant to the Chargee Bank. The balance sum of RM6,688,153.42 is still held by the Stakeholders.

(8) The SSA was subject to an important condition precedent at Clause 4.01. Clause 4.01 set out that the sale and purchase of the shares was conditional upon approval of Foreign Investment Committee ('FIC'), Securities Commission ('SC') and Kuala Lumpur Stock Exchange ('KLSE'). The Plaintiff was to apply for the said approvals from these bodies.

(9) Clause 4.01 of the SSA also required the approval of:

(a) The respective shareholders of the Plaintiff and the Defendant to the sale and purchase of the Shares;

(b) Approval of the Ministry of Finance ('MOF') for the sale and purchase of the Shares by the Plaintiff to the Defendant, as required by the MOF's letter of 3.5.1995 to SJ Securities, which approval the Defendant shall procure the Company [SJ Securities Sdn Bhd] to apply for.

(10) The Plaintiff made the relevant applications to the FIC on 20.12.2000, to the KLSE on 26.12.2000 and to the SC on 26.12.2000. This was conveyed to the Defendant in a letter dated 29.1.2000. The application for approval by the MOF was made on 29.12.2000.

(11) Clause 4.05 of the SSA stipulated that if the said approvals and consents referred to above were not obtained or fulfilled within 3 months from the date of the SSA ('the Cut Off Date') or such later date as 'may be reasonably required and mutually agreed upon in writing' between the Plaintiff and the Defendant 'despite all reasonable efforts', the SSA would lapse and be of no further effect and the Defendant has to refund the Deposit paid by the Plaintiff within 14 business days from the Cut Off Date and the parties would be released from all further obligations to each other.

(12) The Cut Off Date under the SSA was 7.2.2001.

(13) As the said approvals and consents were not obtained by the Plaintiff or the Defendant by the Cut Off Date, the Plaintiff wrote to the Defendant asking for an extension of 3 months from the Cut Off Date.

(14) On 7.2.2001, the Defendant wrote to the Plaintiff stating that it would only agree to one month's extension of the Cut Off Date and this extension was to be subject to the condition that the Plaintiff pays the Defendant interest at the rate of 10% per annum calculated on the balance purchase price of the Shares from 7.2.1001 to the date on which all approvals and consents are obtained.

(15) This condition was not acceptable to the Plaintiff who then wrote to the Defendant on 28.3.2001 informing them accordingly and stated that in accordance with the SSA, as the conditions precedent referred to at Clause 4.01 had not been fulfilled by the Cut Off Date, the SSA had lapsed and accordingly demanded the return of the Deposit of RM32,800,000.00.

(16) A further letter demanding the return of the Deposit was sent on 10.5.2001 by the Plaintiff. A subsequent letter of demand was issued by the Plaintiffs solicitors on 9.8.2001.

(17) The Plaintiff also contends that by virtue of Clause 3.04 of the Supplemental SSA, the obligation to return the Transfer Documents pertaining to the shares only accrues upon return of the Deposit.

(18) Therefore, the Plaintiff seeks the following prayers in the Statement of Claim:

(a) the sum of RM32,800,000 due and outstanding as at 17.4.2001;

(b) interest at the rate of 8% per annum from 18.4.2001 to the date of judgment;

(c) interest at the rate of 8% per annum from the date of judgment to the date of full realization;

(d) costs of this action.

[10] The defendant's summary of case in encl 110 reads as follows:

Summary of Case for the Defendant

15.9.2000: Memorandum of Agreement between Defendan and Rashid Hussain Securities Sdn. Bhd. ('RHS') for purchase of subject shares in SJ Securities Sdn. Bhd. By clause 12, RHS could nominate a nominee to sign the formal Sale Agreement. 2% deposit, termed earnest money, amounting to RM6,656,000 paid.

7.11.2000: Formal Sale Agreement signed between Defendant and Plaintiff for purchase of subject shares for RM328 million. Balance deposit of RM26,240,000 paid to stakeholder solicitors.

30.11.2000: Supplemental Sale Agreement signed inter alia amending clause 3.02 dispensing with subject shares to be a continuing security requiring KLSE approval and for stakeholders to hold the shares and the residual deposit after redemption pending completion of sale.

30.11.2000: RM19,551,846.58 from balance deposit sum paid to Amanah Merchant Bankers to redeem pledged shares. Stakeholder Solicitors retain redeemed shares plus unemcumbered shares and the residual deposit of RM6,698,153.42.

26.12.2000 to 29.12.2000: Approvals applied for by parties to fulfill condition precedents under Clause 4.01.

29.1.2001: Plaintiff applied for 3 month extension of Cut-off-Date.

7.2.2001: Defendant agreed to 1 month extension subject to 10% interest on balance purchase price.

22.2.2001: Meeting between parties. Dispute as to what was agreed.

28.3.2001: Plaintiff declared retrospectively that Sale Agreement lapsed on 7.2.2001 and asked for refund of deposit.

12.4.2001: Approvals received from Securities Commission for sale.

3.5.2001: Plaintiff sought to confirm that Cut-Off date is 7.3.2001.

April/May 2001: Newspaper articles on Securities Commission's changed policy on merger of stockbroking firms for 'universal broker status.' Sufficient now for merchant bank to merge with one stockbroking firm to become 'universal broker'.

4.5.2001: Plaintiff notified KLSE unilaterally that sale aborted with Defendant and Mercury Securities but continues with Straits Securities.

6.6.2001: Stakeholder Solicitors gave notice to the Defendant to give written confirmation to release deposit.

15.6.2001: Defendant wanted Plaintiff to complete sale.

9.8.2001: Plaintiffs Solicitors reply reiterating Agreement has lapsed and ask for refund of deposit.

21.8.2001: Defendant stated Plaintiffs stand was a repudiation and that deposit would be forfeited.

27.9.2001: Defendant's Solicitors gave notice of forfeiture of deposit.

[11] The statement of agreed facts reads as follows:

STATEMENT OF AGREED FACTS

(1) The Plaintiff is a public limited company incorporated in Malaysia and having its registered office at Level 8, Tower Three, RHB Centre, Jalan Tun Razak, 50400 Kuala Lumpur.

(2) The Defendant is a company incorporated in Malaysia and having its registered office at Box 313, Lot 5.42, 5th Floor, Wisma Central, Jalan Ampang, 50450 Kuala Lumpur and a business address at Level 17, Menara Shahzan Insas, Jalan Sultan Ismail, 50250 Kuala Lumpur.

(3) The Defendant is the sole shareholder of a company known as SJ Securities Sdn Bhd ('SJ Securities') and holder of all the issued and paid-up share capital of SJ Securities comprising 60,000,000 ordinary shares of RM 1.00 each ('the Shares').

(4) The Defendant and Rashid Hussain Securities Sdn Bhd a wholly owned subsidiary of the Plaintiff, entered into a Memorandum of Agreement ('MOA') dated 15.9.2000.

(5) The Plaintiff and the Defendant then entered into a Sale of Shares Agreement dated 7.11.2000 ('SSA') which was subsequently varied and modified by a Supplemental Sale of Share Agreement ('Supplement SSA') dated 30.11.2000.

(6) The SSA included, among other clauses, Clause 4.01, which reads as follows:

Clause 4.01
CONDITIONS PRECEDENT
The sale and purchase of the Sale Shares is conditional upon:

(a) the approvals of the:

(i) Foreign Investment Committee:

(ii) The Securities Commission and the Minister of Finance, Malaysia via the Securities Commission; and

(iii) Kuala Lumpur Stock Exchange;

for the sale and purchase of the Sale Shares being obtained, which approvals shall be applied for by the Purchaser;

(b) the approval of the respective shareholders of the Purchase and the Vendor to the sale and purchase of the Sale Shares pursuant to the terms and conditions of this Agreement being given; and

(7) the approval of the Ministry of Finance for the sale and purchase of the Sale Shares by the Vendor to the Purchase, as required by the Ministry of Finance's letter dated 3 May 1995 to the Company, which approval the Vendor shall procure the Company to apply for.

(8) On 15.9.2000, the Plaintiff, paid an initial deposit in the sum of RM6,560,000 to the Defendant pursuant to the SSA.

(9) On 7.11.2000, the Plaintiff paid a further sum of RM26,240,000 being the balance of the deposit pursuant to the SSA, which deposit was held by Messrs. Kadir Andri Aidham & Partners as stakeholders ('Stakeholders'). The initial deposit and the balance deposit shall be referred to as 'the Deposit'.

(10) The Stakeholders released a sum of RM19,551,846.58 to the Chargee Bank, Amanah Merchant Bank, being the redemption sum for that part of the Shares charged by the Defendant to the Chargee Bank on 30.11.2000. The balance of RM6,688,153.42 is still held by the Stakeholders.

(11) The Plaintiff made the relevant applications to the Foreign Investment Committee on 29.12.2000, to the Kuala Lumpur Stock Exchange on 26.12.2000 and to the Securities Commission on 26.12.2000. The Defendant submitted its application to the Ministry of Finance on 29.12.2000.

(12) By a letter dated 29.1.2001, the Plaintiff requested the Defendant for an extension of three (3) months of the Cut-Off Date as the relevant approvals and consents were not obtained by either the Plaintiff or the Defendant.

(13) The Defendant responded to the Plaintiffs letter of 29.1.2001 vide a letter dated 7.2.2001.

(14) The Plaintiff by its letter dated 28.3.2001 and 10.5.2001 respectively and its' solicitors' letters dated 6.6.2001 and 9.8.2001 demanded from the Defendant a refund of RM 32,800,000.00 being the Deposit paid by the Plaintiff to the Defendant under the SSA.

(15) The Plaintiff received the Defendant's letters dated 15.6.2001 and 21.8.2001 respectively and the Defendant's solicitors' letter dated 27.9.2001.

(16) The Plaintiffs solicitors responded to the Defendant's letter of 27.9.2001 vide a letter dated 18.10.2001.

[12] The statement of issues to be tried reads as follows:

STATEMENT OF ISSUES TO BE TRIED

(1) What was the agreement between the Plaintiff and the Defendant as to Cut Off Date (as defined in Clause 4.05 of the Share Sale Agreement dated 7.11.2000 ('SSA')?

(2) What was the status of the SSA as at 7.2.2001?

(3) Whether the Plaintiff is entitled to the return of the deposit of RM32,800,000 ('the Deposit')?

(4) Whether any obligation on the part of the Plaintiff to return the Shares and Transfer Documents is dependent on the return by the Defendant to the Plaintiff of the Deposit.

(5) Whether the Defendant is entitled to forfeit the Deposit and whether the Defendant is entitled any form of damages and if so what is the proper measure of damages?

THE PRELIMINARIES

[13] Four witnesses gave evidence for the plaintiff and two witnesses gave evidence for the defendant. The plaintiff's evidence was consistent with the relevant documents but the same cannot be said for the defendant. In the instant case, despite severe cross examination of the plaintiff's witness the defendant was not able to establish their version of the case more importantly, the concern and complaint in their letter dated 15 June 2001 (encl 112 – p 186). The crucial correspondence, inter alia, to determine the issue in hand is found in encl 112 – p 151, the letter dated 29 January 2001 by the plaintiff to the defendant. The cut off date as 7 February 2001 is clearly stated, and in consequence any confusion relating to this issue in subsequent correspondence without any contemporaneous objection by the defendant will lack probative force. In this respect, the other relevant letters found in encl 112 are as follows: (i) letter dated 7 February 2001; (ii) letter dated 29 March 2001 (p 165); (iii) letter dated 3 May 2001; (iv) letter dated 10 May 2001; (v) letter dated 6 June 2001; and (vi) letter dated 9 August 2001.

[14] It is pertinent to note that PW4 Tan Sri Dato' Abdul Rashid bin Hj Mohamad Hussian had given the reasons as to why the agreement could not be continued — there was no real evidential challenge to the evidence of PW4. PW4's evidence was forthright and I have no reason to disbelieve him.

[15] I have heard the evidence, read the documents and submission of the parties in detail. Both learned counsel have meticulously dealt with the issues, the relevant facts, law and contradiction etc. The court is grateful. It will serve no useful purpose to repeat the same save to deal with the core issues. After

having given much consideration to the submission of learned counsel for the defendant, I take the view that the plaintiff's claim must be allowed and the defendant's counterclaim must be dismissed. My reasons, inter alia, are as follows:

(a) it is the contention of learned counsel for the plaintiff that pursuant to cl 4.01 the sale and purchase of shares was a conditional contract, ie subject to the approval of the relevant authorities, and if the approval was not obtained on or before 7 February 2001, the agreement ceases to be effective, unless there was an extension that too mutually agreed in writing has been secured as set out in cl 4.05. If such extension is not in place, the share sale agreement lapses and the defendant is obliged to refund the deposit;

(b) learned counsel for the plaintiff says that cl 4.01 conditions are contingent conditions and not a promissory condition and relies on the case of *Hotel Anika Sdn Bhd v Majlis Daerah Kluang Utara* [2007] 1 MLJ 248; [2006] 4 CLJ 981 where it was stated:

> A contingent condition, as we have already referred it, is aprovision in a contract to the effect that the contract shall not take effect unless and until the condition is fulfilled, and the non-fulfillment of the condition does not render either party liable in damages to the other; whilst a promissory condition, on the other hand, is an essential term of the contract, the breach of which entitles the innocent party to break itself as discharged from the contract and to sue for damages.

Learned counsel to drive home this point relies on ss 33 and 36 of the Contracts Act 1950 which read as follows:
Section 33:

> (a) Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.
>
> (b) If the event becomes impossible, such contracts become void.
>
> ILLUSTRATIONS
>
> (a) A makes a contract with B to buy B's horse if A survives C. This contract cannot be enforced by law unless and until C dies in A's lifetime.
>
> (b) A makes a contract with B to sell a horse to B at a specified price, if C, to whom the horse has been offered, refuses to buy him. The contract cannot be enforced by law unless and until C refuses to buy the horse.
>
> (c) A contracts to pay B a sum of money when B marries C. C dies without being married to B. The contract becomes void.

Section 36:

> (1) Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time become void if, at the expiration of the time fixed, the event has not happened, or if, before the time fixed, the event becomes impossible.
>
> When contracts may be enforced which are contingent on specified event not happening within fixed time.
>
> (2) Contingent contracts to do or not to do anything if a specified uncertain event does not happen within a fixed time may be enforced by law when the time fixed has expired and the event has not happened, or, before the time fixed has expired, if it becomes certain that the event will not happen.
>
> ILLUSTRATIONS
>
> (a) A promises to pay B a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year, and becomes void if the ship is burnt within the year.
>
> (b) A promises to pay B a sum of money if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year, or is burnt within the year.

And says:

(i) Clause 4.01 is a condition precedent and relies on the case of *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd, The Good Luck* [1992] 1 AC 233 where Lord Goff of Chieveley described the 'classical sense' in English law if a condition precedent as being a provision:

> under which the coming into existence of (for example) an obligation, or the duty or further duty to perform an obligation, is dependent upon the fulfillment of the specified condition,

(ii) The expression 'condition precedent' is also used to describe a contingency which must be fulfilled in order to bring a particular contractual obligation into operation. That contingency may be the performance by one party of a contractual obligation of his own, or may be some other event (such as the giving of a notice). And relies on *Persimmon, Homes (South Coast) Ltd v Hall Aggregates (South Coast) Ltd* [2008] EWHC 23 79 (TCC) where Coulson J said:

> It is trite law that, if one party's obligation to do something under a contract is contingent upon the happening of a particular event, the circumstances of that event must be identified unambiguously in the contract. It must be clear beyond doubt how and in what circumstances the relevant obligation has been triggered.

(c) Learned counsel for the defendant asserts that cl 4.05 being a clause that excuses performance is generally considered as a species of force majeure clause and the party which relies on such a clause bears the burden of proving that the situation comes within the ambit of the clause. Clause 4.05 reads as follows:

> In the event that the approvals and consents mentioned in Clause 4.01 are not obtained or fulfilled within three (3) months from the date of this Agreement or such other later date as may be reasonably required and mutually agreed upon in writing between the parties hereto (which agreement shall not be unreasonable withheld) ('the Cut-Off Date') despite all reasonable efforts by the parties hereto, then this Agreement shall lapse and be of no further effect and the Vendor shall, within fourteen (14) Business Days of the Cut-Off Date, refund to the Purchaser the Deposit and thereafter the parties shall be released from all further obligations to each other.

(d) I am in agreement with the submission of learned counsel for the plaintiff that cl 4.05 is not a force *majure clause*. *Force majure* clauses are clauses generally intended to include risks beyond the reasonable contract of a party. In essence, it frees both parties from liability or obligation when an event such as war, riot or act of God such as earthquake takes place. By no stretch of imagination can cl 4.5 be stated as *force majure* clause as asserted by the defendant; and

(e) I am inclined to accept the submission of the plaintiff that the defendant is liable to pay the plaintiff as prayed and the counterclaim must be dismissed.

[16] For reasons stated above, the plaintiff's prayers (a), (b) and (c) with interest of 4% pa are allowed with costs. The defendant's counterclaim is dismissed with costs of RM100,000. The plaintiff to pay allocatur fees before the extraction of order for costs, and the deputy registrar to issue certificate for the allocatur.

[17] I hereby order so.

A *Plaintiff's claim allowed and defendant's counterclaim dismissed.*

Reported by Ibnu Aswan

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